Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

REQUEST FOR CLARIFICATION

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys, hereby requests that the Commission clarify the *First Report and Order* in the captioned proceeding[1] by specifying a date certain before which any party intending to enforce an existing exclusive programming agreement subject to newly-adopted Section 76.1002(c)(2) of the Commission's Rules must file a Petition for Exclusivity. For the reasons set forth below, WCA fears that unless such a clarification is forthcoming, there could be unnecessary delays in achieving the public benefits that will flow from assuring that wireless cable and other competitors to cable have fair access to programming.

Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") amended the Communications Act of 1934 by adding a new Section 628 that, *inter alia*, requires the Commission to develop rules with respect to areas served by cable systems that "prohibit exclusive contracts for satellite cable programming or satellite

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[1] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Implementation of Competition and Diversity in Video Programming Distribution and Carriage*, FCC 93-178 (rel. April 30, 1993)[hereinafter cited as *"First Report and Order"*].

broadcast programming between a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, unless the Commission determines . . . that such contract is in the public interest." [2] Consistent with the clear mandate of Section 628(c)(2)(D), the *First Report and Order* adopts rules that "require any vertically integrated programmer or any cable operator seeking to execute an exclusive contract to seek and obtain [the Commission's] public interest judgment before doing so."[3] Specific rules governing the content of a Petition for Exclusivity and the procedures surrounding Commission consideration of such petitions are set forth in newly-adopted Section 76.1002(c)(5) of the Commission's Rules.[4]

Section 76.1002(c)(5) becomes effective on July 16, 1993.[5] While the *First Report and Order* is clear that the Commission must make an affirmative public interest determination before any new exclusive programming agreement can be executed, the *First Report and Order* does not establish special procedures to be followed by parties to exclusive programming agreements executed before July 16. Thus, read literally, Section 76.1002(c)(5) bars the enforcement of any such agreement on and after July 16 unless the Commission has

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[2]Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §19 (1992)(emphasis added). Section 628(h) of the Communications Act exempts, to the extent they relate to areas served by a cable operator, exclusive contracts that were entered into on or before June 1, 1990 until such time, after October 5, 1992, that they are renewed or extended.

[3]*First Report and Order, supra* note 1, at ¶ 67.

[4]*See id* at Appendix E, pp. 6-7.

[5]*See id.* at ¶ 162.

determined beforehand that such agreement advances the public interest.

Considering the vigor with which the cable industry argued during the proceedings leading to the *First Report and Order* over the factors to be considered in determining whether an exclusive agreement serves the public interest,[6] WCA anticipates that ultimately more than a few Petitions for Exclusivity will be filed. Yet, with the effective date of Section 76.1002(c)(5) barely a month away (and despite the passage of six weeks since the *First Report and Order* was released), WCA understands that not one Petition for Exclusivity has been filed. Because the pleading cycle for a Petition for Exclusivity alone lasts a minimum of forty days,[7] time has run out for any parties intending to have an exclusive contract declared in the public interest prior to July 16.

What troubles WCA is that at least one of its members has been advised by a vertically-integrated programmer that programmers have until November 13 to seek a Commission declaration that a given exclusive agreement serves the public interest. Apparently, that programmer believes it can defend against a Section 76.1002(c) complaint brought on or soon after July 16 by claiming that it is entitled to renegotiate exclusive agreements until November 13 and then submit a Petition for Exclusivity after November 13.

Such an interpretation of the *First Report and Order* is incorrect. WCA can only

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[6]*See id.* at Appendix C, pp. 44-48.

[7]Under Section 76.1002(c)(5), the Commission will give public notice of any Petition for Exclusivity, commencing a thirty day period during which any competing multichannel video programming distributor ("MVPD") affected by the proposed exclusive agreement may oppose such petition. The petitioner then has ten days to submit a response. *See id.* at Appendix E, pp. 6-7.

assume that this programmer has misread Paragraph 122 of the *First Report and Order*, which affords parties to existing programming agreements until 120 days after July 16, 1993 to bring those agreements into compliance with the program access anti-discrimination rules set forth in Section 76.1002(b).[8] Since Paragraph 122, by its own terms, only applies to discrimination barred by Section 76.1002(b), it has no bearing on exclusive agreements barred under Section 76.1002(c).

The contention that parties to exclusive agreements subject to Section 76.1002(c) have until mid-November to submit Petitions for Exclusivity is not only incorrect as a matter of law, it is inconsistent with the Commission's underlying goals in implementing Section 19 of the 1992 Cable Act. One of the Commission's stated objectives in crafting its program access rules has been to provide effective relief to aggrieved multichannel video programming distributors by ensuring speedy justice.[9] It would be patently at odds with this objective to delay for all practical purposes the effective date of Section 76.1002(c) several additional months. Indeed, while WCA can only speculate as to why other parties to exclusive programming agreements have failed to submit Petitions for Exclusivity, WCA fears that others may try to capitalize on the lack of specificity in the *First Report and Order* regarding the procedures for filing Petitions for Exclusivity pertaining to pre-July 16 exclusive programming agreements. It has already been more than eight months since the 1992 Cable Act has become law -- wireless cable operators should not have to wait any longer than

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[8] *See id.* at ¶ 122.

[9] *Id.* at ¶ 9.

July 16 to begin securing the access to programming Congress has mandated.

To avoid any delays in ascertaining which existing exclusive programming agreements, if any, are in the public interest, the Commission should issue an order clarifying the *First Report and Order* by establishing a date certain by which a Petition for Exclusivity relating to a pre-July 16 exclusive agreement must be filed. Specifically, WCA suggests that the Commission establish the July 16, 1993 effective date of Section 76.1002(c) as the date by which a Petition for Exclusivity must be filed relating to any agreement in existence prior to July 16. Such a clarification will make certain that the procedures applicable to pre-July 16 exclusive agreements subject to Section 76.1002(c) minimize delay in affording MVPDs access to programming, and that all involved understand those procedures from the outset.

Respectfully submitted,

THE WIRELESS CABLE ASSOCIATION,
INTERNATIONAL, INC.

By: 
Paul J. Sinderbrand

Sinderbrand & Alexander
888 Sixteenth Street, N.W.
Suite 610
Washington, D.C. 20006-4103
(202) 835-8292

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